STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMAL RANDLE,

Defendant-Appellant.

UNPUBLISHED
February 25, 2003

No. 231998
Wayne Circuit Court
LC No. 99-000778

Before: Jansen, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to seven to twenty years' imprisonment for the armed robbery conviction and a consecutive two-year term for the felony-firearm. Defendant now appeals as of right. We affirm.

In January 1994, the complainant was robbed at gunpoint outside his son's babysitter's house. The complainant described the assailant to police, but did not know his name. Several months later, defendant's father entered the complainant's place of business (a pawn shop) with a younger man who was carrying a television set. The complainant immediately recognized the younger man as the person who had robbed him and stepped out to confront him. Specifically, the complainant testified:

> I immediately came out to where Mr. Randle was and looked him dead in his face and he looked at me dead in my face. He immediately dropped his head. I didn't even have to say anything to him. He turned around and immediately starts walking out at a fast pace.

The complainant also testified that he said, "[t]his is the S.O.B. that robbed me" and tried to "get at" defendant, but other employees held him back. The complainant broke free and followed defendant out the door and was able to write down the license plate number of defendant's fleeing car.

Defendant's father remained behind in the shop to complete his transaction. When asked whether he knew the younger man, he denied knowing him. However, another customer in the store said that he had attended high school with the fleeing man, and identified him as "Jamal Rando."

At trial, another pawn shop employee identified defendant as the man in the shop that day. Defendant's father was not called as a witness at trial, but in a post-trial affidavit he stated that his son had not accompanied him to the pawn shop (another man of similar build did) and that he did not correct the customer because he did not understand what everyone was talking about.

Following the incident at the pawn shop, the complainant gave the name "Jamal Rando" to the police as the name of his suspected assailant, as well as the license plate number he had noted. However, due to an administrative error, this information did not reach the detective investigating the robbery.

Defendant's identity remained unknown until late 1998. At that time, the complainant's son, who was present during the robbery, called the complainant into a room because defendant's photograph was being shown on television in connection with an unrelated investigation into the killing of a police officer. The complainant saw the photo on TV and again contacted the police to inform them that defendant was the man who had robbed him. The complainant and his son picked defendant's photo out of a photographic lineup, and defendant was arrested for the instant offense.

At trial, defendant's principal defense was that he was not the person who robbed the complainant or the person who was identified at the pawn shop because he either used crutches or walked with a limp and could not carry heavy objects.

I. Prearrest Delay

Defendant moved for dismissal, both before and after trial, on the ground that prearrest delay violated his right to due process. He argues that the trial court erred in denying his motions to dismiss. In a related argument, he urges that the delay led to the loss of evidence and witnesses, which deprived him of his right to compulsory process under the Sixth and Fourteenth Amendments of the United States Constitution.

We review the trial court's decision for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 389; 633 NW2d 376 (2001). To prevail, defendant must show that prearrest delay resulted in actual and substantial prejudice to his right to a fair trial and that the prosecution intended a tactical advantage. *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000).

We find no abuse of discretion. The delay in this case resulted from an erroneous transcription of defendant's last name as "Rando" and an apparent recordkeeping error at the police department, which kept helpful information from reaching the appropriate investigating officer. Defendant has not shown that the prosecution intended a tactical advantage from these errors.

Moreover, defendant has not shown substantial prejudice. His claim that he may have been receiving physical therapy during isolated portions of certain days beginning in April 1994 does not establish an alibi for the pre-dawn robbery in January 1994. It is unduly speculative to conclude that a "therapy" alibi would contradict the complainant's testimony that defendant was

the person at the pawn shop – the therapy sessions only lasted between 45 minutes and an hour, once or twice a week, for about five weeks.

Defendant also argues that the "real" robber, who he alleges was a Mr. Purvis (now deceased) could have been subpoenaed to attend defendant's trial and confess to the crime had defendant been arrested and charged sooner. We agree with the trial court, however, that it is unreasonable to conclude that Purvis would admit that he accompanied defendant's father to the pawn shop *and* confess to the crime. We also agree with the trial court that photographs of Purvis and defendant do not exhibit similarities. Accordingly, we do not believe it is likely that the complainant would have identified Purvis as the robber had Purvis been available for a live in-court viewing.

For similar reasons, we reject defendant's argument that the delay denied him the right to compel witnesses to attend. The only witness who may have been affected was Purvis, who was killed in an unrelated robbery in April 1998. Defendant has not cited any authority for his unique proposition that the death of a potential witness is equivalent to denial of a defendant's right to use legal process to compel the attendance of witnesses. Moreover, if defendant is correct in his assumptions about Purvis' proposed testimony, Purvis' Fifth Amendment rights – and not defendant's prearrest delay – would have rendered him unavailable for testimony. In addition, defendant has not shown prejudice because the substance of Purvis' testimony (except for an unlikely outright confession) could have been obtained from other sources – in particular, defendant's father was available to testify that Purvis accompanied him to the pawn shop.

II. Effective assistance of counsel

Defendant next argues that he was denied the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution for three reasons: (1) counsel was ineffective in presenting medical testimony because he did not locate and call as a witness the physical therapist who treated defendant, and he introduced medical records but did not attempt to make sense of the lengthy and complicated records for defendant's benefit; (2) counsel did not call defendant's father as a witness to testify about the identity of the man who accompanied him to the pawn shop; and (3) counsel did not move for a mistrial after the officer in charge referred to a homicide investigation, which defendant argues violated an order in limine precluding any reference to the killing of the police officer which led to defendant's television exposure.

The right to counsel is not offended unless counsel's performance fell below an objective standard of reasonableness and the defendant was so prejudiced that he was deprived of a fair trial. *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052, 2065; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994); *People v Tommolino*, 187 Mich App 14; 466 NW2d 315 (1991). Prejudice exists when the court can conclude that there is a reasonable probability that the result of the proceeding would have been different – that is, the jury would have had a reasonable doubt about guilt. *Pickens*, *supra* at 312; *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Generally, to properly present an ineffective assistance of counsel claim, a defendant must make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), unless the

details of the alleged deficiency are apparent on the already-existing record, *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987). Among the grounds raised in defendant's motion for new trial was the ineffective assistance of counsel. He did not originally include counsel's failure to move for a mistrial as one of the grounds (that motion was based solely on trial counsel's treatment of the medical issues), but he added the issue to an amended motion and brief in support. In both motions he asked for an evidentiary hearing regarding counsel's effectiveness.

At the post-judgment hearing, defendant presented arguments about the ineffective assistance of counsel claim, including his argument that counsel should have moved for a mistrial. An evidentiary hearing was never scheduled, though, and therefore trial counsel was not called as a witness to explain his conduct.

In its opinion, the trial court addressed the first two allegations of ineffective assistance, but made no findings regarding counsel's failure to move for a mistrial. The court found that additional testimony from defendant's physical therapist would have been cumulative to evidence presented by defendant and members of his family. The court also found that defendant himself bore any responsibility for failing to mention his father's visit to the pawn shop.

Defendant did not move this Court to remand for an evidentiary hearing, see MCR 7.211(C)(1)(a), and does not argue that the trial court's failure to conduct a hearing was error. In his brief on appeal, however, he now requests that this Court remand the matter for a hearing. We decline that request.

Counsel's manner of presenting medical evidence must be regarded as a matter of trial strategy. We will not second-guess his decision not to call defendant's physical therapist as a witness. See *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Other defense witnesses supplied ample medical testimony. Counsel's decision not to summarize the medical records, and his closing argument in which he stated that the records were voluminous and confusing, also did not constitute ineffective assistance. The records were indeed voluminous and not easily translated by lay persons. Contrary to defendant's argument, however, trial counsel did not urge the jury to ignore the records. Instead, he asked them to focus on those portions that were written in "plain English" rather than concentrate on confusing portions.[1] Because counsel presented ample evidence of defendant's medical condition through witnesses, we cannot say that a different presentation of the medical records would have led to a different result.

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[1] Specifically, counsel argued:

> I'm not going to ask you to spend two or three hours looking through them because you're probably like me, you don't understand them anyway. But there is enough plain English in there for you to clearly see what [defendant] testified to on the stand, what his family testified to on the stand are true. His physical limitations were true.

We will not speculate regarding whether defendant's father's failure to testify was the product of attorney error. Decisions concerning what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Even assuming counsel was aware of defendant's father's testimony, based on the evidence presented, it is clear the witness' credibility would have been called into question. Counsel's reasons for failing to call defendant's father do not appear on the record and, therefore, cannot support reversal. Therefore, on this record, we are unable to find counsel was ineffective for failing to present defendant's father as a witness.

Finally, on this record, we also are unable to find that counsel was ineffective for failing to move for a mistrial after a police witness mentioned "homicide." On the first day of trial, defendant moved to preclude any references to the police killing that propelled defendant's name and face onto television. The court orally granted the motion:

> MR. NOBLE [*defense counsel*]: . . . I have a brief motion in limine to prohibit any reference to a police shooting in December of 1998 by any of the – or references thereto by the prosecution witnesses.
>
> THE COURT: Any objection to that, Mr. Shulman?
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> MR. SHULMAN [*prosecutor*]: No, Your Honor, with the proviso that I believe what [*sic*] the testimony will be that Mr. Randle's picture was on television, that's where an initial identification was made by the complainant.
>
> So I anticipate that the testimony will be that he saw him on television. As far as facts about a shooting or police shooting, clearly I am not going to get into that.
>
> THE COURT: Well that's fine. And I agree with that. I am going to grant your motion. I don't believe the police shooting part should show up at all. That the complainant can testify that he saw Mr. Randle on television but that could be for many reasons. I mean Good Samaritans, all kinds of people are on television everyday.
>
> So I don't think being on television has any implication that there was some kind of bad thing or criminal activity. So as long as the complainant just testifies to the fact that he saw Mr. Randle on television without any of the circumstances surrounding that I have no – that will be my ruling.

During examination of the officer-in-charge, the prosecutor asked about the course of the robbery investigation. The officer gave a non-responsive answer, which mentioned "homicide" twice:

> *Q*: And who did you talk to who witnessed the robbery?
>
> *A*: * * *

> I went to Homicide and ascertained if any weapons that fit the description that were used in the holdup had been confiscated in search warrants and a number of locations. I reviewed some of the statements at Homicide in regards to Mr. Jamal's arrest. I went to the Wayne County Jail and took a statement from or as much information as I could get from him at that time.

No objection was asserted at trial, and defendant did not move for a mistrial.

With regard to defendant's argument that counsel should have moved for a mistrial when the officer mentioned "homicide," there are no evidentiary proofs or judicial findings regarding whether a mistrial motion would have been successful or whether counsel was ineffective for failing to make such a motion. We are not persuaded that the police officer's non-responsive testimony violated the specific terms of the order in limine. The order focused on defendant's connection to the killing of a police officer; the trial testimony did not link him to the killing of a police officer or to any other killing.

Affirmed.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Hilda R. Gage